

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 06/12/15; Decision Issued: 07/01/15; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 10608; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10608

Hearing Date: June 12, 2015
Decision Issued: July 1, 2015

PROCEDURAL HISTORY

On April 21, 2015 Grievant was issued a Group III Written Notice with termination (effective date of termination: 4/21/15; offense date: 3/16/15) for *Failure to Follow Instructions and/or Policy* (Written Notice Offense Code 13). The Written Notice indicated:

Violation of OP 038.1 Reporting Serious or Unusual Incidents. On March 16th, 2015, a use of force was used against an offender, [Grievant] was aware of the use of force and failed to report it.¹

On April 23, 2015 Grievant filed a *Grievance Form A - Dismissal Grievance* and indicated the relief wanted was, "To be made whole and Group 3 removed."² The Grievance was qualified in full indicating, "Formal disciplinary actions qualify for a hearing." Effective May 18, 2015 undersigned was appointed hearing officer in this matter.

The grievance hearing was commenced at Facility on June 3, 2015. However, due to matters arising at the hearing, the grievance hearing was adjourned and was reconvened on June 12, 2015 at Facility. At the conclusion of the grievance hearing the parties agreed to submission of written closing arguments and submitted same, via e-mail, on June 19, 2015.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the Agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).
4. Whether there were mitigating circumstances justifying reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

¹ Tab 3 and testimony.

² Tab 4.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.³

HEARING

The following appeared at the grievance hearing held at Facility on June 3, 2015 and continued to June 12, 2015:

Grievant (who also was a witness)
Agency Advocate at Hearing
Agency Party Representative at Hearing (who also was a witness)
Witnesses

Exhibits were admitted, *en masse*, by agreement. Agency's Exhibits consist of one binder of exhibits tabbed 1 through 5. No exhibits were admitted by Grievant.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each of the witnesses, the Hearing Officer makes the following findings of fact:

01. Grievant was employed as a Correctional Officer Sr. at Facility. She has been employed by Agency for approximately three years.⁴

02. On March 15, 2015 at or about 12:47 a.m. two inmates at Facility were removed from their cell by correctional officers and each inmate was taken to a separate office. In each office, while handcuffed behind their back, the inmate was the subject of a use of force by correctional officers.⁵

03. Grievant was present for the use of force incidents, was aware of the use of force against the two inmates, but did not report the use of force.⁶

04. The two inmates reported being assaulted by staff to Facility medical staff on March 16, 2015. Examination of the two inmates was made by medical staff at Facility and the two inmates were observed to have bruises and cuts.⁷

05. Medical staff reported the incident to management and an investigation was initiated by Facility Investigator and SIU Investigator. During the investigation Grievant provided statements confirming the assaults occurred in her presence and that she did not report the assaults.⁸

³ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

⁴ Tab 4.

⁵ Tab 5, testimony.

⁶ Testimony, Tab 5 (pg. 34-35).

⁷ Testimony.

⁸ Tabs 4, Tab 5, and testimony.

CONCLUSIONS

Operating Procedures... OP 135.1 and OP 038.1:

OP 135.1 ... Standards of Conduct

The Department of Corrections, pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: February 1, 2014) divide unacceptable behavior into three groups, according to the severity of the behavior. Group I offenses include types of behavior less severe in nature, but which require correction in the interest of maintaining a productive and well-managed work force. Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.⁹

OP 135.1 provides, in pertinent part:¹⁰

Section IV. (E.):

The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with this operating procedure based on the severity of the offense.

Section V. (A.) (2.):

When in the judgment of the agency Human Resource Officer, DOC management or the appointed authority, mitigating circumstances exist; specified corrective action may be reduced or increased beyond the normal level.

- (d.) Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. DOC may consider any unique impact that a particular offense has on the DOC, and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. (see Attachment 2)

OP 038.1... Reporting Serious or Unusual Incidents¹¹ provides, in pertinent part:

I. PURPOSE

This operating procedure ensures effective communications and reporting of incidents involving Department of Corrections employees, offenders, or physical assets. Incident reporting shall be required for any situation or event that involves the life, health, or safety of employees, volunteers, visitors, or offenders; damages to state property; or a situation that has the potential of subjecting the agency to public comment.

II. COMPLIANCE

This operating procedure applies to all units operated by the Department of Corrections (DOC). Practices and procedures shall comply with applicable State

⁹ Tab 1.

¹⁰ Tab 1.

¹¹ Tab 2.

and Federal laws and regulations, Board of Corrections policies and regulations, ACA standards, PREA standards, and DOC directives and operating procedures.

III. DEFINITIONS

Incident - An actual or threatened event or occurrence outside the ordinary routine that involves the life, health and safety of employees, volunteers, guests, or offenders (incarcerated or under Community supervision), damage to state property, or disrupts or threatens security, good order and discipline of a facility or organizational unit.

IV. PROCEDURE

A. Incident Reporting

1. Timely and accurate reporting of incidents that occur in the Department of Corrections is essential for proper management and administration. ...
5. Incidents shall be reported to appropriate supervisory or administrative personnel including the following minimum information. ...

B. Internal Incident Reports

1. Any DOC employee, contract employee, or volunteer that observes or has knowledge of and incident affecting the safe, orderly operation of a DOC organizational unit shall report that incident.

C. Incident Reports

1. Serious or unusual incidents as defined in this operating procedure shall be reported to the Regional and/or Central Office level using an *Incident Report* in VACORIS.
2. Incidents listed in the *Incidents Requiring Immediate Telephone Notification* section of this operating procedure, shall be reported by telephone immediately to be followed by noon the next working day with an *Incident Report* submitted in VACORIS. ...
3. Incidents listed in the *Incidents Not Requiring Immediate Telephone Notification* section of this operating procedure, shall be reported by noon on the next working day with an *Incident Report* Submitted in VACORIS. ...

E. Incidents Not Requiring Telephone Notification

1. The following incidents shall be reported by submission of the *Incident Report* by noon on the next working day as directed above.
 - c. Offender allegations of staff assault or neglect that is supported by a preliminary investigation
 - d. Use of force; ...

Use of Force:

Late in the night on March 14, 2015 two inmates were overheard in their cell by staff talking about Grievant. A Correctional Officer indicated to Grievant one of the inmates said he noticed Grievant had her sweater on and one inmate said he would like to rip it off or watch her take it off and, if he were to get his hands on her, he would [f---] the [f-----] out of her. Grievant notified Sgt. of the matter.

Around 12:47 a.m. on March 15, 2015 two Sergeants sent two Correctional Officers to escort the two inmates from their cell. The two inmates were brought in handcuffs (handcuffed

behind their back) and placed in separate offices. While in the separate offices the two inmates were subjected use of force and were struck a number of times by correctional officers. Grievant was present and aware of these actions but did not report the matter.¹²

This incident was reported on March 16, 2015 by the two inmates to medical staff at Facility. The medical staff reported the incident to management and an investigation was initiated by Agency.

Agency Investigation:

Institutional Investigator and SIU Investigator conducted an investigation into matters. Investigators reviewed Rapid Eye Camera recordings showing the two inmates were brought from their cell and put into separate offices while handcuffed behind their back. Neither of the interiors of these offices was in the view of the Rapid Eye Camera but the Rapid Eye Camera did record the persons entering and exiting the offices and provided a timeline of such entries and exits. The Rapid Eye Camera recorded Grievant's presence and movements in relation to the two offices.

Interviews were conducted with the two inmates and with other named parties. One inmate reported being assaulted by staff, pushed against wall and being hit, closed hand, by two officers. This inmate indicated Grievant did not hit him. The second inmate reported being hit in his face and body while held by his throat and, when he went to the ground, alleged Grievant kicked him twice.

Grievant admitted to investigators she observed the inmates being assaulted and stated she did not assault the inmates. She also stated to investigators she did not report the matter.

One Officer interviewed at first denied the assaults occurred then recanted his statement but denied he assaulted anyone. A second Officer interviewed also first denied the assaults occurred and then recanted his statement indicating two other staff assaulted the inmates. The two other correctional officers identified as participants in this matter denied any assaultive behavior.

Two nurses were interviewed and confirmed their observations of cuts and bruises on the two inmates. One inmate exhibited bruising below his eye and on his elbow while the other inmate had a scratch to his adam's apple, bruises and abrasions mid-abdomen, red marks on his back, and scabbed area on his left elbow.

Warden:

Warden brought disciplinary actions against Grievant and the 4 other correctional officers involved with the use of force/assault incident. Ultimately, Grievant and the other 4 Agency employees who were involved with the matter were terminated from employment. Two of the terminated employees were probationary and, as such, did not have access to the Grievance procedure. The remaining individuals (including Grievant) all received a Group III with termination.

Warden expressed strong concerned that the assault/use of force incident had occurred. He also was concerned that Grievant, a Correctional Officer Sr., would be aware of the incident and not report it as required by OP 038.1.

¹² Tabs 4 & 5 and testimony.

Warden testified felt he could not charge Grievant with assault because at the time the Agency's investigation was not complete. Grievant was not disciplined and terminated based upon any allegation of an assault on her part. However, Warden felt it was clear, at that point, that an assault had taken place, Grievant had observed it, and she did not report it. Warden proceeded with issuing Grievant a Group III Written Notice with termination for failure to follow policy (i.e. OP 038.1) because she did not report the incident.

Grievant:

Grievant does not contest that the assaults/use of force took place in her presence and does not contest she did not report the incident. However, she contends:

- The discipline issued her was excessive and she should not have been terminated.
- She assumed her supervisor, who was a party to matters, would report the matter.
- She felt cornered into silence/scared.
- Her supervisor, who was the involved in the incident, was who she should have reported the incident to.

Consideration is given to the circumstances surrounding this matter and the assaultive nature of the incident which Grievant failed to report. Circumstances include the use physical force/assault by correctional officers on handcuffed inmates who were removed from their cell just after midnight and who were taken into offices whose interior was not monitored by cameras. Grievant, and other correctional officers, were involved and/or observers to a use of force/assault against persons placed under the care and control of Agency. Agency employees, including Grievant, have a duty to act in a manner consistent with law and policy.

There is evidence as to attempts to keep matters "silent" by certain employees involved in the incident. Grievant's written statement addresses being told by others involved in the incident to, "be sure and tell them we were only talking to them" and "stick to the story." Among other matters she stated a Sgt. was "instructing me on what to say when I get questioned about the events of the weekend" and to "be sure and act surprised". She indicates she was also told, "We got each other's backs" and "I sure hope you know what to say when they ask you. I'd hate to see what happens if you say the wrong thing." These conversations with Grievant addressing what to say were made after Grievant had observed the matters at issue and not reported them.

Grievant was aware of or should have been aware of OP 038.1 and its requirements for reporting of "Incidents" as defined therein. All employees, including Grievant, are mandated with reporting Incidents as defined in OP 038.1 to "appropriate supervisory or administrative personnel". OP 038.1 does not provide for a mandatory reporting to one's supervisor but specifically provides for mandatory reporting of an "Incident" to "appropriate supervisory or administrative personnel".

OP 038.1, does not provide that a subordinate does not have to report an "Incident" if it involves his/her supervisor. Grievant knew or should have known that she was required to report an "Incident" involving her Supervisor and that the DOC Chain of Command provided who the report could have been made to.

Grievant raised feeling cornered and/or scared as to reporting the "Incident". However, these feelings are balanced against the serious nature and circumstances of the assault/use of force which Grievant was present for, observed, but failed to report. Additionally, these feelings and/or her fear are balanced with her duties under law and policy. The evidence indicated, as a correctional officer her duty, as a minimum, was to report the incident of inmates being assaulted.

Group III with termination:

The use of force under these circumstances qualified as an "Incident" as defined in OP 038.1 and as such Grievant is required to report the incident to appropriate supervisory or administrative personnel.

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy is listed in OP 135.1 as an example of a Group II offense. However, OP 135.1 provides that its list of offenses is illustrative and not all-inclusive and further provides an offense typically associated with one offense category may be elevated to a higher level offense. OP 135.1 further provides the DOC may consider any unique impact that a particular offense may have on the DOC and may consider the fact that the potential consequences of the performance or misconduct substantially exceeds agency norms.

Grievant indicated she observed an inmate being kned in the abdomen, hit with an open hand around the head, and closed fist punched to the abdomen and back but did not report the incident.¹³

Management has the duty and right to manage the affairs of the Agency. Agency took into consideration the circumstances surrounding this incident. Agency has the expectation that its employees' actions will be consistent with policy and has promulgated OP 038.1 imposing a requirement that any of its employees that observes or has knowledge of an incident affecting the safe, orderly operation of a DOC organizational unit shall report that incident, in a timely manner, to management.

Agency took into consideration its duty to the public its responsibility for the inmates placed in its charge. Agency also took into consideration the nature and seriousness of the incident which substantially exceeded agency norms of behavior for its employees. Agency considered its duty to insure such incidents are reported and not kept hidden, its duty to investigate and address any such incidents, and its need for timely reporting of such incidents. Agency also took into consideration the effect on not reporting incidents may have on Agency.

Upon consideration of the evidence presented in this cause, and as is provided for in OP 135.1, Agency action in elevating Grievant's *Failure to Follow Instructions and/or Policy* (Written Notice Offense Code 13) to a Group III with termination was proper.

Mitigation:

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1.

The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

¹³ Tab 4, pg. 34-36.

If the agency does not prevail as to any of the elements (i) through (iii) above, the disciplinary action should not be upheld. If the agency prevails on all three elements, the hearing officer must then consider whether the grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances. Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.

Upon consideration of and without repeating the matters discussed hereinabove, taking into consideration all the evidence presented in the cause, including the testimony of witnesses, Grievant's discipline is not found to exceed the limits of reasonableness. Agency has taken into consideration aggravating and mitigating circumstances. Furthermore, mitigating circumstances justifying reduction or removal of the disciplinary action are not found.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Agency's issuance to Grievant of a Group III Written Notice with termination is ***upheld***.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means

such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to: Grievant
Agency Advocate
EDR